that his records were photocopied without his permission, then there should be a remedy. There is respectable authority to support this view.

DiBella v. United States, 82 S.Ct. 654 (1962)

Rogers v. United States, 158 F.Supp. 670 (U.S.D.C. S.D. Cal. 1958)

Lord v. Kelley, 223 F.Supp. 684 (U.S.D.C. Mass. 1963)

Hinchcliff v. Clarke, 230 F.Supp. 91 (U.S.D.C. N.D. Ohio 1963)

As to the facts themselves, the Court finds: that the petitioner was initially advised by the defendants that one of them was a Special Agent for the Internal Revenue Service; that the other was an Internal Revenue Service Agent; that they wished to see his business records for the purpose of investigating his tax returns; that petitioner was advised by the defendants that he would not have to show them his records and that he would not have to give them any information if he did not so desire. Nevertheless, the Court finds that petitioner agreed that the defendants could examine his business records, which were subsequently photocopied by the defendants, and that petitioner did so voluntarily without any threats or promises of any kind being made to him by the defendants.

The Court further finds that, on the basis of the testimony of the petitioner's accountant, Mr. Markow, he, Mr. Markow, turned over Mr. Selinger's business records to the defendants of his own free will and not under the pressure of any threats or coercion or misrepresentations. It is true, and the Court accepts this testimony as a fact, that Mr. Bigler testified that he told Mr. Markow that Mr. Selinger had given them permission to see the records; but it is also

true that, while Mr. Markow denied that this was said to him, nevertheless, Mr. Markow agreed that he voluntarily let the defendants see the business records of Mr. Selinger, which the defendants photocopied.

The Court also finds that the business records photocopied by the defendants at Mr. Selinger's place of business during the morning of October 21, 1965 were also voluntarily made available to the defendants by the petitioner and that when Mr. Rudy Boehmer, the Office Manager for the petitioner, made these records available, he did so with the knowledge that Mr. Selinger had given him the authority to make these records available to the defendants and that in any case, he turned these records over to the defendants voluntarily and not under the pressure of any threats or coercion.

Since all of the records photocopied by the defendants were obtained with the consent of petitioner, the Court denies petitioner's Motion to Suppress this evidence and denies the request that this evidence so photocopied be returned to petitioner, and it is so ordered.

The Court concludes that this evidence was not illegally obtained and that none of the petitioner's constitutional rights have been violated.

One other issue was determined by the Court during the course of these hearings.

On January 7, 1966, hearing was held on petitioner's request for an Order to Show Cause why the defendants should not be punished for contempt of Court for alleged violations of the temporary Restraining Order previously issued by the Court. So that the record is clear, the Court specifically finds that the Restraining Order of the Court was not violated. The evidence adduced at this hearing, from the various witnesses who testified, shows that the only investigation carried out by the defendants, after the

date of the Restraining Order, was based on information not obtained from the business records of Mr. Selinger that were photocopied. The information, in fact, upon which the defendants conducted the investigation after the date of the temporary Restraining Order, was obtained from the income tax returns of petitioner and from a letter received by the Internal Revenue Office from a confidential informant.

The Court also specifically rules that the defendants are not enjoined from proceeding further with their investigation of petitioner or from using the information obtained from the petitioner's business records which they have photocopied.

Dated this 27th day of April, 1966 at Phoenix, Arizona.

United States District Judge

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United States Court of Appeals
For the Ninth Circuit

No. 21,116

Walter Selinger,
Appellant,

vs.

Lester Bigler, Special Agent of the Internal Revenue Service, et al.,
Appellees.

[April 27, 1967]

On Appeal from the United States District Court for the District of Arizona

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Before: Jertberg and Merrill, Circuit Judges, and Taylor, District Judge

Per Curiam:

Selinger appeals from the denial of his motion to return copies of his records and suppress their use as evidence made pursuant to F.R.Cr.P. 41(e).[1] The copies were made by agents of the Internal Revenue Service in the course of an investigation under circumstances which, appellant asserts, amounted to an unlawful search and seizure. The District Court denied relief upon the ground that appellant had given consent to the examination of his records.

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1. See *Hoffritz v. United States*, 240 F.2d 109 (9th Cir. 1956); *Rodgers v. United States*, 158 F.Supp. 670 (S.D.Cal. 1958). This is an appealable final order under 18 U.S.C. § 1291 (1964) per *Goodman v. United States*, 369 F.2d 166 (9th Cir. 1966).

Appellant contends that his constitutional right to counsel was violated under *Escobedo v. Illinois,* 378 U.S. 478 (1964), in that the investigation had reached the accusatory stage (a Special Agent having participated in the investigation), and he was not advised of his rights. This court has ruled against appellant's contention in *Kohatsu v. United States,* 351 F.2d 898 (9th Cir. 1965), *cert. denied,* 384 U.S. 1011 (1966). Appellant seeks to distinguish that case. We find no basis for distinction and regard the decision as controlling here.

Appellant challenges the court's finding of a voluntary consent. In our judgment the finding was not clearly erroneous.

Appellant contends that the court's finding of consent was not sufficient to support a conclusion that constitutional rights had not been violated. In our judgment the finding was sufficient.

Affirmed.